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Utah Court of Appeals

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Matthew F. McNulty; Florence M. Vincent; Alex B. Leeman; Van Cott, Bagley, Cornwall and McCarthy; Attorney for Plaintiffs and Petitioners.

Unknown.

Recommended Citation

Legal Brief, *Al Cea v. ATC Marketing, L. L. C. D/B/A American Timbercraft*, No. 20100728 (Utah Court of Appeals, 2010).
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IN THE UTAH COURT OF APPEALS

AL CEA, an individual; and LAURA CEA,
an individual,

Plaintiffs/Petitioners,

vs.

ATC MARKETING, L.L.C. D/B/A
AMERICAN TIMBERCRAFT, a Utah
limited liability company; 18 PLUS,
L.L.C., a Utah limited liability company;
MODULAR MANUFACTURING, L.L.C.,
a Utah limited liability company;
INVESTORS COLLABORATIVE, L.L.C.,
a Utah limited liability company; JOHN A.
NIPKO, individually and doing business as
ATC MARKETING, L.L.C. D/B/A
AMERICAN TIMBERCRAFT; MIKE
NYBORG, individually and doing business
as ATC MARKETING, L.L.C. D/B/A
AMERICAN TIMBERCRAFT and 18
PLUS, L.L.C.; JEFFREY PEACOCK,
individually and doing business as
MODULAR MANUFACTURING, L.L.C.
and INVESTORS COLLABORATIVE,
L.L.C.; ROGER HOFFMAN, individually
and doing business as MODULAR
MANUFACTURING, L.L.C. and
INVESTORS COLLABORATIVE, L.L.C.;
RICK KOERBER, individually and doing
business as MODULAR
MANUFACTURING, L.L.C. and
INVESTORS COLLABORATIVE, L.L.C.;
and DOES 1-20, inclusive,

Defendants/Respondents.

No. 20100728-CA

(Case Nos. 20100728-CA and 20100729-
CA Consolidated for Purposes of this
Appeal)

FILED
UTAH APPELLATE COURTS
FEB 24 2011

BRIEF OF PETITIONERS AL CEA AND LAURA CEA

On appeal from the Second Judicial District Court, Weber County
Case No. 080901240, Honorable Pamela G. Heffernan

Matthew F. McNulty, III (3828)
mmcnulty@vancott.com
Florence M. Vincent (11492)
fvincent@vancott.com
Alex B. Leeman (12578)
aleeman@vancott.com
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
36 South State Street, #1900
Salt Lake City, Utah 84111
Telephone: (801) 532-3333

Attorneys for Plaintiffs and Petitioners

ORAL ARGUMENT REQUESTED

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fvincent@vancott.com

Alex B. Leeman (12578)

aleeman@vancott.com

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

36 South State Street, #1900

Salt Lake City, Utah 84111

Telephone: (801) 532-3333

Attorneys for Plaintiffs and Petitioners

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Purchase Agreement

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Memorandum Decision Re: Defendant Hoffman

Memorandum Decision Re: Modular Manufacturing LLC and Investors
Collaborative

[Proposed] Order Granting Defendant Roger Hoffman's Motion for Summary
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[Proposed] Order Granting Defendants Modular Manufacturing, LLC and
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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) as this case was transferred to this Court from the Supreme Court of Utah. Original appellate jurisdiction was proper in the Supreme Court of Utah pursuant to Utah Code Ann. § 78A-3-102(3)(j) because this is an appeal from the orders, judgments, and decrees of a court of record over which this Court did not have original appellate jurisdiction.

ISSUES PRESENTED AND PRESERVATION BELOW

1. Whether the district court erred in concluding that no issues of material fact exist as to whether defendants/respondents Modular Manufacturing, L.L.C. (“Modular”) and Investors Collaborative, L.L.C. (“Investors”) breached their contractual obligations, engaged in fraud, or made negligent misrepresentations, when Modular—and Investors as a controlling member of Modular—assumed the responsibilities of defendant/respondent ATC Marketing, L.L.C. (“ATC”) (doing business as American Timbercraft), represented as much to plaintiffs/petitioners Al Cea and Laura Cea (collectively, the “Ceas”), and failed or refused to perform said obligations?

2. Whether the district court erred in concluding that no issues of material fact exist as to whether defendant/respondent Roger Hoffman (“Hoffman”) could be personally liable, whether the letter written on behalf of Modular and delivered to the Ceas could constitute an offer or guarantee, whether the letter lacks consideration, and whether there is evidence of misrepresentations, breach of contract, or fraud on the part of Hoffman, when Hoffman was personally actively involved in the acquisition of ATC

by Modular and in the management of Modular, and when Hoffman personally authorized the letter sent on behalf of Modular to the Ceas?

3. Whether the district court erred in granting summary judgment to defendants/respondents, Modular, Investors, and Hoffman, while factual discovery was not yet complete and the Ceas had submitted formal discovery requests to obtain evidence relating to the genuine issues of material fact that exist in this case?

4. Whether the district court erred in issuing memorandum decisions which violate Rule 56(d) of the Utah Rules of Civil Procedure by failing to specify the uncontroverted facts in this case, relying on conclusory statements, lacking specificity, and failing to include a written statement of the grounds for the court's decision?

5. Whether the district court erred in signing the proposed orders prepared by counsel for defendants/respondents, Modular, Investors, and Hoffman, when those orders violate Rule 7(f)(2) of the Utah Rules of Civil Procedure for failure to conform to the court's memorandum decisions.

These issues were preserved below, to the extent possible, in the Ceas' opposition to the Respondents' motions for summary judgment, at oral argument on those motions, and in the Ceas' objections to the form of orders prepared by counsel for Respondents relating to the district court's granting summary judgment in favor of Respondents.

STANDARD OF REVIEW

Appellate courts in Utah "review a district court's decision to grant summary judgment for correctness, granting no deference to the district court's conclusions, and [they] view the facts and all reasonable inferences in the light most favorable to the

nonmoving party.” *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶16, 215 P.3d 933 (citing *Arnold Indus., Inc. v. Love*, 2002 UT 133, ¶ 11, 63 P.3d 721). The appellate court determines “only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact.” *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 14, 234 P.3d 1105 (quoting *Kouris v. Utah Highway Patrol*, 2003 UT 19, ¶ 5, 70 P.3d 72).

The appellate courts review of questions of law for correctness, granting no deference to the district court’s rulings. *Workman v. Brighton Props., Inc.*, 1999 UT 30, ¶ 2, 976 P.2d 1209 (summary judgment reviewed for correctness); *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 19, 974 P.2d 288 (proper application of law reviewed for correctness).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns a purchase agreement dated June 7, 2006 (the “Purchase Agreement”) between the Ceas and ATC, pursuant to which the Ceas paid \$172,112.00 as a deposit for a modular home. (Addendum Ex. 1; R. 29-38.) The Purchase Agreement and the Ceas’ deposit were assumed by and assigned to Modular, an entity majority owned and controlled by Investors. (Addendum Ex. 2; R. 42.) ATC and Modular, as assignee of ATC’s obligations, failed and/or refused to satisfy their obligations under the Purchase Agreement. (R. 4-9, 13-21.) This default on the part of Modular occurred despite the material representations contained in a letter authorized by Hoffman that was

sent on behalf of Modular to the Ceas which stated that Modular would fully perform ATC's obligations under the Purchase Agreement for the same price and with the same specifications as specified in the Purchase Agreement. (Addendum Ex. 2; R. 42.) This letter from Modular to the Ceas (the "Letter") also provided an alternative offer to the Ceas: that if the Ceas did not want Modular to perform in ATC's stead, the Ceas could opt to have their previously paid deposit refunded in full. (Addendum Ex. 2; R. 42.)

The Ceas first responded to the Letter on March 22, 2007, by faxing a letter to Hoffman and defendant Jeffrey Peacock ("Peacock"), stating that the Ceas desired to have their modular home completed and would accept Modular's performance in lieu of ATC's. (R. 1038, 1126-27.) Modular failed to respond or otherwise attempt to communicate with the Ceas regarding the Ceas' acceptance of Modular's assumption of ATC's obligations. (R. 6, 13-16.) Having received no response, the Ceas faxed a second letter to Hoffman and to defendant Rick Koerber ("Koerber") on March 29, 2007, stating that the Ceas would accept Modular's alternative offer: to refund in full the Ceas' previously paid deposit for their modular home. (R. 1038, 1129.)

Modular has failed and/or refused to satisfy the obligations of ATC under the Purchase Agreement which were assumed by and assigned to Modular. (R. 6, 13-16.) Modular has further failed and/or refused to refund the deposit paid by the Ceas pursuant to that agreement. (R. 6, 13-16.)

In February 2008, the Ceas filed a complaint in Utah State Court naming, among others, Modular, Investors, and Hoffman (collectively "Respondents") as defendants. (R. 1-47.) In December 2009, Respondents each moved for summary judgment, which the

Ceas opposed. (R. 730-779, 829-1268.) Following a hearing, the District Court issued two memorandum decisions (the “Memorandum Decisions”) on August 19, 2010. (Addendum Exs. 3-4; R. 1685-90.) One of the two Memorandum Decisions was titled, “Memorandum Decision Re: Defendant Hoffman.” (Addendum Ex. 3; R. 1685-87.) The other of the two Memorandum Decisions was titled, “Memorandum Decision Re: Modular Manufacturing LLC and Investors Collaborative LLC.” (Addendum Ex. 4; R. 1688-90.) The Memorandum Decisions granted summary judgment in favor of Respondents, and against the Ceas. (Addendum Exs. 3-4; R. 1685-90.) The District Court granted these motions for summary judgment despite the fact that genuine issues of material fact exist and the Ceas were awaiting resolution of their motion to compel discovery involving these Respondents which would produce evidence in support of the Ceas’ factual assertions and arguments.

On September 10, 2010, the Ceas timely filed their Petitions for Permission to Appeal the interlocutory orders. (R. 1719-24.) The Supreme Court of Utah transferred this matter to this Court on September 28, 2010. (R. 1743-44.) This Court granted the Ceas’ Petitions for Permission to Appeal on October 26, 2010, and on October 28, 2010 this Court consolidated the Ceas Petitions into this appeal. (R. 1825-27, 1831.)

In the mean time, counsel for Respondents prepared orders for the district court. (Addendum Exs. 5-6; R. 1733-42.) Those orders (the “Orders”), while purportedly based upon the Memorandum Decisions, did not conform to the court’s decisions as required by Rule 7(f)(2) of the Utah Rules of Civil Procedure. Specifically, the Orders added statements of the grounds upon which the court’s decisions were based, descriptions of

allegedly undisputed facts, statements regarding the Ceas' Motion to Compel which was scheduled for a hearing but which was never heard, and included an award of attorney's fees. (Addendum Exs. 3-6; R. 1685-90, 1733-42.) None of these statements and awards contained in the Orders were found in the Memorandum Decisions. The Ceas therefore timely objected to the form of the Orders. (R. 1694-1705.) The district court, however, signed the proposed orders, omitting only the most egregious portions of the non-conforming orders, despite the fact the Orders violate Rule 7 of the Utah Rules of Civil Procedure. (Addendum Exs. 5-6; R. 1733-42.)

II. FACTS RELEVANT TO ISSUES PRESENTED ON APPEAL

The Ceas paid ATC \$172,112.00 as a deposit (the "Deposit") for a modular home, pursuant to the Purchase Agreement dated June 7, 2006. (Addendum Ex. 1; R. 7, 8, 14, 29-38, 45.) Thereafter, Modular, which was formed by Investors, entered into one or more agreements ("Acquisition Agreements") with ATC. (Addendum Ex. 7; R. 1451-63.) Under those agreements, Modular acquired ATC's assets and certain liabilities, assuming "all work in progress and pending orders." (Addendum Exs. 2, 7; R. 42, 1451-63.) Those agreements were drafted and signed on behalf of Modular by Hoffman, who testified that the Acquisition Agreements constituted an assumption of the liability and acceptance of the obligation owed to the Ceas. (Addendum Ex. 7; R. 1451-63, 1465-66.)

Modular sent a letter to the Ceas (the "Letter") wherein Modular offered to complete the Ceas' order for the same price and specifications as in the Purchase Agreement. (Addendum Exs. 1, 2; R. 29-38, 42.) Alternatively, Modular offered to refund the Deposit if the Ceas did not want Modular to complete their order. (Addendum

Ex. 2; R. 42.) The Ceas accepted the offer to have Modular complete their order by faxing a letter to Hoffman and Peacock on March 22, 2007. (R. 1038, 1126-27.) After receiving no response, they then faxed a letter to Hoffman and Koerber on March 29, 2007 seeking a refund of the Deposit. (R. 1038, 1129.) Modular never responded and the Ceas never received their home or Deposit. (R. 6, 13-16.)

SUMMARY OF ARGUMENTS

The district court erred by granting summary judgment in favor of Respondents because genuine issues of material fact exist, the moving parties are not entitled to judgment as a matter of law, discovery was not yet complete, and the Memorandum Decisions lack necessary details, analysis, and findings of fact. The district court further erred in signing proposed orders which violate Rule 7(f)(2) of the Utah Rules of Civil Procedure.

Several genuine issues of material fact exist, which make summary judgment in favor of the Respondents improper. Specifically, genuine issues of material fact exist as to Hoffman's relationship with Modular; whether the Letter constituted one or more offers which were accepted by the Ceas, whether the Letter was supported by adequate consideration; whether Hoffman could be personally liable for the representations made in the Letter; whether Modular and/or Investors are contractually obligated to the Ceas; whether the Letter was sufficiently certain and definite to provide the basis for a contract between the Ceas and Respondents; and whether there was any fraudulent or negligent misrepresentation on the part of the Respondents in their communications with the Ceas. These numerous and substantial genuine issues of material fact cannot be decided as a

matter of law. The district court therefore erred in granting summary judgment in favor of Respondents while genuine issues of material fact remain.

Further, summary judgment was improper because the parties have not yet completed factual discovery. Importantly, the Ceas submitted several formal discovery requests to gather evidence in support of their arguments pertaining to several of the outstanding genuine issues of material fact in this case. The Ceas' formal discovery requests were not adequately responded to by Respondents. The Ceas moved to compel Respondents to adequately respond to the Ceas' discovery requests. The district court was aware of the Ceas' pending motion to compel discovery at the time of the hearing on Respondents' motions for summary judgment. The Ceas obtained a hearing date on their motion to compel before the district court issued the decisions granting summary judgment in favor of Respondents. The district court thus granted summary judgment in favor of Respondents knowing that factual discovery on these matters is not yet complete. The district court thus erred in granting summary judgment in favor of Respondents.

Additionally, the district court's Memorandum Decisions violate Rule 56(d) of the Utah Rules of Civil Procedure. The Memorandum Decisions fail to specify the uncontroverted facts in this case, provide only conclusory statements, and lack specificity. The memorandum decision granting summary judgment in favor of Modular and Investors states only that there are no disputes as to material facts. The memorandum decision granting summary judgment in favor of Hoffman fails to even state that there are no disputes as to material facts. Further, the Memorandum Decisions violate Rule 52(d)

of the Utah Rules of Civil Procedure by failing to include a written statement of the grounds for the court's decision.

Finally, the district court's Orders violate Rule 7(f)(2) of the Utah Rules of Civil Procedure because the Orders do not conform to the court's Memorandum Decisions. The Orders, prepared by counsel for Respondents, provided statements of the basis upon which the court's decisions were based, provided statements of allegedly undisputed facts, contained statements dismissing the Ceas' Motion to Compel factual discovery which was still pending before the court, and included an award of attorney's fees. None of these statements, descriptions, or awards can be found in the Memorandum Decisions, but were concocted by counsel for Respondent without basis. The Ceas timely objected to the form of the Orders, but the district court signed those Orders, redacting the most egregious portions but failing to address the remainder of the Ceas' objections pertaining to the Orders.

For these reasons, the orders of the district court granting summary judgment in favor of Respondents should be vacated and remanded for completion of factual discovery and further proceedings.

ARGUMENT

The district court erred by granting summary judgment in favor of Respondents because genuine issues of material fact exist, the moving parties are not entitled to judgment as a matter of law, discovery was not yet complete when summary judgment was granted, and the Memorandum Decisions lack necessary details, analysis, and findings of fact. The district court's orders granting summary judgment in favor of

Respondents should also be vacated on grounds that the orders violate Rule 7(f)(2) of the Utah Rules of Civil Procedure.

I. Summary Judgment was Improper Because Genuine Issues of Material Fact Exist

The Utah Supreme Court has held, “Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 36, ¶ 15, 606 Utah Adv. Rep. 28; Utah R. Civ. P. 56(c). “[A] court in considering a motion for summary judgment must view the facts and inferences . . . in the light most favorable to the party moved against.” *W. M. Barnes Co. v. Sohio Natural Resources Co.*, 627 P.2d 56, 59 (Utah 1981) (citations omitted). “A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on any material issue.” *Ron Shepherd Ins. v. Shields*, 882 P.2d 650, 655 (Utah 1994) (quoting *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982)) (internal quotations omitted). Genuine issues of material facts exist in this case, making summary judgment improper.

A. A Genuine Issue of Material Fact Exists as to Hoffman’s Relationship and Liability With Regards to Modular

The first genuine issue is whether Hoffman was a mere agent of Modular or whether Hoffman had a more substantial relationship with Modular that would impose personal liability upon him for his actions. Whether an agency relationship exists is generally an issue of fact. *Mecham v. Consol. Oil & Transp.*, 2002 UT App 251, ¶ 8, 53 P.3d 479 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 314 (Utah 1998)). Only if “the agent’s authority is undisputed, or different reasonable logical inferences may not be

drawn therefrom” does the question of whether an agency relationship exists become a matter of law. *See id.* (quoting 3 Am. Jur. 2d *Agency* § 373, at 891-92 (2000)). In the case at bar, Hoffman’s role as an “agent” of Modular is disputed and different logical inferences may be drawn from the facts of this case. Thus, there exists a genuine issue of material fact which could not be determined as a matter of law.

Specifically, the following facts are in dispute which are relevant to the issue of whether Hoffman was an agent of Modular or not. Respondents claim Modular never made any distributions, Hoffman never received any distributions from Modular, Hoffman is not a member of Modular, and Hoffman did not assume to act for Modular with respect to the purported distributions. (R. 1260-62.) The Ceas contest these facts, arguing that Modular did in fact make distributions, that such distributions were made while Modular was insolvent, and that Hoffman played a substantial role in Modular’s decision to make those insolvent distributions. (R. 1040-43.) Accordingly, the Ceas argue Hoffman is not merely an agent of Modular, but rather should be held personally liable for his and Modular’s actions as a “person[] who assume[d] to act as a company without complying with [the Utah Revised Limited Liability Company Act].” UTAH CODE ANN. § 48-2c-602.

During discovery, the Ceas attempted to obtain production of documents and responses to interrogatories regarding Hoffman’s role with Modular and Investors, as well as any and all distributions made by Modular and Investors. (R. 1499-1517.) Such requests, however, were never fully responded to. (R. 1499-1517.) In March 2010, the

Ceas filed a Motion to Compel in the district court, seeking to compel adequate responses to the Ceas' discovery requests. (R. 1499-1517.)

A date was set for hearing of oral arguments on the Ceas' motion to compel on October 26, 2010. (R. 1682-83.) The Memorandum Decisions were issued, granting summary judgment in favor of Respondents, while the Ceas' motion to compel was still pending before the court. The district court was made aware of the pending motion to compel and the fact that discovery was not yet completed during oral arguments on the Respondents' motions for summary judgment. The factual discovery which the Ceas sought in their Motion to Compel, and which these Respondents failed to provide through formal discovery requests, are the very facts which the trial court should have considered before granting summary judgment; i.e., whether Modular made distributions, whether Hoffman received distributions, whether Hoffman played a role in Modular's making distributions, the solvency or insolvency of Modular when any such distributions were made, and the solvency or insolvency of Modular when it sent the Letter to the Ceas.

The Utah Revised Limited Liability Company Act (the "Act") prohibits making distributions if the effect of the distribution would leave the company unable to pay its debts as they become due or effectively leave the company insolvent. *See* UTAH CODE ANN. § 48-2c-1005. The factual discovery sought in the Ceas motion to compel would support their argument that Modular made distributions while it was a "financial train wreck" in violation of the Act, and that Hoffman authorized those distributions as manager of Modular, thereby making Hoffman personally liable as an individual who purported to act like a company in violation of the Act. The Ceas' discovery requests

regarding the financial status of Modular went entirely ignored, remarkably on the basis that the information sought was irrelevant and/or confidential. That information is necessary to establish whether there are issues of material fact as to whether, at the time the Letter was issued, Modular was insolvent. Accordingly, summary judgment was improper and the district court's orders granting summary judgment should be vacated.

B. A Genuine Issue of Material Fact Exists as to Whether the Terms of the Letter Constituted One or More Valid Offers, Whether the Ceas Accepted Such Offer(s), Whether Adequate Consideration Exists to Form a Valid and Binding Contract, and Whether Hoffman Could be Personally Liable for the Representations Authorized by Him in the Letter

The second genuine issue of material fact is whether the Letter, which was personally authorized by Hoffman and sent on behalf of Modular, constituted one or more offers which were accepted by the Ceas, whether there existed adequate consideration to support the contract, and whether Hoffman may be personally liable for the representations made to the Ceas therein. “[W]here the existence of a contract is the point in issue and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist.” *O’Hara v. Hall*, 628 P.2d 1289, (Utah 1981) (quoting *Pre-Fit Door v. Dor-Ways*, 13 Ariz. App. 438, 477 P.2d 557 (1970)). Further, the question of “whether a party accepted an offer so as to form a binding contract [is] for the jury to decide.” *Id.* (citing *Thornton v. Pasch*, 104 Utah 313, 139 P.2d 1002 (1943)).

Respondents contend the Letter did not constitute an offer which could be accepted by the Ceas, but rather was intended only to provide an option to enter into future contracts. (R. 1256.)

The Ceas dispute the idea that the Letter's purpose was only to provide an option to enter into future contracts. (R. 1142-43.) The Letter constituted two offers: an offer to build the Ceas' home for the same price and specifications as stated under the Purchase Agreement but with Modular substituted for ATC, and an offer to refund the Ceas' deposit and relieve Modular of its obligation to perform.

Further, Respondents contend the Letter lacks consideration to form a contract. (R. 1256.) Thus, Respondents argued that no parties are contractually bound by the contents of the Letter. (R. 1256.)

The Ceas contend the Letter was supported by consideration, value, and promises. (R. 1140-43.) Such consideration includes: (a) the Ceas promise to accept Modular's performance in lieu of ATC's performance, (b) the Ceas agreement to pay Modular the remainder of the purchase price for the completion of the home, and (c) the Letter giving Modular a means to escape performance of its obligations by giving the Ceas the option to back out of the contract and have their Deposit refunded to them.

Finally, Hoffman contends that he cannot be personally liable under the Letter because "[t]here is no basis for independent obligation by Hoffman" (R. 1260-62.) The Ceas disagree, noting that if Hoffman is personally liable for the actions of Modular as a person who assumed to act as a company in violation of the Utah Revised Limited Liability Act—the matter addressed above in which the Ceas were not allowed to

complete discovery—then Hoffman would be personally liable because Modular authorized and sent the Letter to the Ceas.

Therefore summary judgment was improperly granted while factual discovery on this issue had not yet been completed. The district court's orders granting summary judgment should be vacated.

C. A Genuine Issue of Material Fact Exists as to Whether Modular and Investors are Contractually Obligated to the Ceas

The interpretation of a contract may be a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent.

Peterson v. Sundrider, Corp., 2002 UT 43, ¶ 14, 48 P.3d 918 (quoting *Kimball v. Campbell*, 699 P.2d 714 (Utah 1985)). Summary judgment is improper where, as in the case at bar, an ambiguity exists in the contract and there is a factual issue as to what the parties intended. *See id.* (citing *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)).

The Ceas were under contract with ATC to have their home built by ATC. (Addendum Ex. 1; R. 29-38.) When Modular acquired ATC's assets, including the Ceas' substantial Deposit, and ATC's obligations, including the Ceas' order for their modular home, the Ceas claim Modular became contractually obligated to complete their home. (Addendum Exs. 2, 7; R. 4, 5, 13-16.) Modular disagrees, claiming it did not acquire the Ceas' contract and was not otherwise obligated to the Ceas. (R. 764.)

Extrinsic evidence of the parties' intent is necessary to resolve the ambiguities. Hoffman, Modular's Rule 30(b)(6) deponent, testified that Modular assumed and

accepted the obligation to build the Ceas' home by and through the Acquisition Agreements. (R. 1465-66.) Respondents' arguments in support of their motions for summary judgment are therefore clearly without merit, and are controverted by their own Rule 30(b)(6) deponent.

The facts relating to the assignment and assumption of ATC's obligations as to the Ceas by Modular are in dispute by the parties, and thus the district court erred in granting summary judgment in favor of Respondents. The district court's orders granting summary judgment should be vacated.

D. A Genuine Issue of Material Fact Exists as to Whether the Letter was Indefinite and Uncertain

Whether a contract exists may be both a question of law and fact. *See LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867. Determining whether a contract exists "may embody several subsidiary rulings." *Brighton Corp. v. Ward*, 2001 UT App 236, ¶ 14, 31 P.3d 594 (citing *Cal Wadsworth Constr. v. St. George*, 865 P.2d 1373, 1375 (Utah Ct. App. 1993)). One such issue is whether the contract is reasonably definite and certain. *See Hackford v. Snow*, 657 P.2d 1271, 1276 (Utah 1982) ("Before specific performance will be employed by the courts to enforce a contract the terms of the agreement must be reasonably certain so the parties know what is required of them, and definite enough that the courts can delineate the intent of the contracting parties) (quoting *Reed v. Alvey*, 610 P.2s 1374 (Utah 1980)); *Diston v. EnviroPak Medical Prods.*, 893 P.2d 1071, 1075 (Utah Ct. App. 1995) (an agreement "must be definite enough to perform and enforce) (citing *Valcarce v. Bitters*, 362 P.2d 427, 428 (Utah 1961)).

Modular and Investors argued there was no contract between Modular and the Ceas because the Letter was uncertain and indefinite. (R. 8-9.)¹ The Ceas disagree. Even if Modular is not contractually obligated to complete the Ceas' home pursuant to the Acquisition Agreements, which Modular is, the Letter constituted two offers: an offer to build the Ceas' home for the same price and with the same specifications as stated under the Purchase Agreement but with Modular's performance substituted for ATC's, and an alternative offer to refund the Ceas' Deposit and relieve Modular of its obligation to perform.

Both offers were certain and definite. The offer to build the house was for the same price and same specifications as contained in the Purchase Agreement. Though the Letter contemplates some minor changes to the existing contract between the Ceas and ATC, Modular made clear that the essential elements of the contract would remain the same. (Addendum Ex. 2; R. 42.) Similarly, the alternative offer to refund the Deposit is certain and definite, the essence being, "If you don't want Modular to build your home instead of ATC, we will refund your deposit."

E. A Genuine Issue of Material Fact Exists as to Whether There was any Fraud or Negligent Misrepresentation

The question of whether or not there was fraud or misrepresentation in this case is a question of fact to be determined by a trier-of-fact. *See Stuck v. Delta Land & Water*

¹ Modular and Investors made this argument in spite of Hoffman's testimony on behalf of Modular that Modular assumed and accepted the obligation to build the Ceas' home by and through the Acquisition Agreements.

Co., 227 P. 791, 796 (Utah 1924) (noting that when a statement may be interpreted as an opinion or a statement of fact and “there is any question as to how it was intended and understood” then whether or not it amounts to fraud is a question of fact for the jury); *Lakeside Lumber Prods. v. Evans*, 2005 UT App 87, ¶ 9, 110 P.3d 154 (“The existence of ‘fraudulent intent is ordinarily a question of fact’”) (quoting *Territorial Sav. & Loan Ass’n v. Baird*, 781 P.2d 452, 462 (Utah Ct. App. 1989)).

Respondents argued there was no fraud or negligent misrepresentation because (1) Hoffman claims he “did not make, execute or deliver the Letter to the Plaintiffs,” he did not enter into any agreement, contract, or understanding with the Ceas, and he has not communicated with the Ceas; and (2) Modular and Investors claim the Ceas did not rely on any representations by Modular to alter their positions to their own detriment. (R. 1243-45, 1256.)

The Ceas dispute these factual assertions by Respondents. Hoffman testified that he authorized distributions by Modular when Modular was a “financial train wreck.” (R. 1047.) These distributions were in violation of the Utah Revised Limited Liability Company Act and thus Hoffman is personally liable for Modular’s actions and obligations. Had Hoffman provided the Ceas with the discovery they requested, but which Hoffman failed to provide, such discovery would have supported the Ceas’ argument and Hoffman’s testimony. Further, the Ceas did rely upon Modular and Investor’s representations to their detriment by not seeking recovery of the money paid towards the construction of their modular home by pursuing claims against Modular and

other defendants in the underlying case until after Modular had already ceased operations and Modular's assets were already looted by Investors.

Viewing these facts in the light most favorable to the Ceas, the district court should have found that genuine issues of material fact exist and Respondents are not entitled to judgment as a matter of law. Accordingly, the district court erred in granting summary judgment to Respondents and the orders granting summary judgment should be vacated.

II. SUMMARY JUDGMENT WAS IMPROPER BECAUSE DISCOVERY IS NOT COMPLETE

In Utah, "Generally, summary judgment should not be granted if discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion." *Bluemel v. Freestone*, 2009 UT App 16, ¶ 5, 202 P.3d 304 (quoting *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah Ct. App. 1987)); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 840 (Utah Ct. App. 1987). In March 2010, the Ceas filed a motion to compel and supporting memorandum seeking an order from the district court compelling Respondents to respond to several production requests and interrogatories that had not been adequately addressed. (R. 1499-1517.) On August 11, 2010, a hearing for oral arguments on the Ceas' motion to compel was scheduled for October 26, 2010. (R. 1682-83.)

Due to the fact discovery is incomplete, and this fact was made known to the district court in the Ceas' opposition to Respondents' motions for summary judgment as well as in oral arguments, the district court erred in granting summary judgment.

III. THE MEMORANDUM DECISION IMPROPERLY LACKS DETAIL, FINDINGS OF FACT, AND ANALYSIS

Rule 56(d) of the Utah Rules of Civil Procedure requires,

If on motion under this rule judgment is not rendered upon the whole case . . . and a trial is necessary, the court . . . shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy.

Utah R. Civ. P. 56(d). In this case, summary judgment has not been rendered upon the whole case and thus Rule 56(d) is applicable. The Memorandum Decisions list several findings of the Court, but do not specify the facts that are not controverted. (Addendum Exs. 3, 4; R. 1685-90.) The memorandum decision granting summary judgment in favor of Modular and Investors states only that there are no disputes as to material facts. (Addendum Ex. 4; R. 1688-90.) Such a conclusory statement by the district court violates Rule 56(d) because it does not “specify[] the facts that appear without substantial controversy . . . including the extent to which the amount of damages or other relief is not in controversy.” The memorandum decision granting summary judgment in favor of Hoffman does not state that there are no genuine issues of material fact nor does it list the facts that are not controverted. (Addendum Ex. 3; R. 1685-87.) Such a lack of specificity and finding of any facts whatsoever clearly violates Rule 56(d).

The Memorandum Decisions also violate Rule 52(a) of the Utah Rules of Civil Procedure which provides, “The court shall . . . issue a brief written statement of the ground for its decision on all motions granted under Rules . . . 56.” In *Dover Elevator*

Co. v. Hill Mangum Inv., 766 P.2d 424, 426 (Utah Ct. App. 1988), this Court acknowledged, “Normally, failure to comply with Utah R. Civ. P. 52(a) would constitute reversible error.” This Court explained, “The rule serves two important purposes. First, findings of fact function to inform the parties about the ‘mind of the court’ and the analysis the court used to resolve the dispute . . . Secondly, findings of fact provide a basis on which an appellate court can review the judgment.” *Id.* (citing *Parks v. Zions First Nat’l Bank*, 673 P.2d 590, 601 (Utah 1983) and *Bastian v. King*, 661 P.2d 953, 957 (Utah 1983)).

The Memorandum Decisions are substantially lacking detail, analysis, and findings of fact, with little to no mention of the grounds upon which the conclusions were drawn or the law applied in making those conclusions, and, as to the memorandum decision granting summary judgment in favor of Hoffman, with no mention whatsoever that there are no issues of material fact in this case.

IV. THE ORDERS VIOLATE RULE 7(f)(2) OF THE UTAH RULES OF CIVIL PROCEDURE BECAUSE THE ORDERS DO NOT CONFORM TO THE MEMORANDUM DECISIONS

Counsel for Respondents prepared orders for the district court. (Addendum Exs. 5, 6; R. 1733-42.) Those orders (the “Orders”), while purportedly based upon the Memorandum Decisions, do not conform to the court’s Memorandum Decisions as required by Rule 7(f)(2) of the Utah Rules of Civil Procedure. (Addendum Exs. 3-6; R. 1685-90, 1733-42.) The Orders list several purportedly “undisputed” facts, including that Investors never made any representations to the Ceas, that Investors’ actions were limited to that of a representative of Modular, that Hoffman never made any personal

representations to the Ceas, that Hoffman's actions were limited to that of a representative of Modular, and the facts regarding the "content and issuance" of the Letter. (Addendum Exs. 5, 6; R. 1733-42.) None of these purported statements of fact are undisputed. Further, the Memorandum Decisions are void of any descriptions of undisputed facts. (Addendum Exs. 3, 4; R. 1685-90.) Thus the Orders substantially and materially differ and fail to conform to the Memorandum Decisions as required by Rule 7(f)(2) of the Utah Rules of Civil Procedure.

Further, the Orders state that the court's decision is based upon the conclusions set forth in the Respondents' proposed orders and supporting memoranda. (Addendum Exs. 5, 6; R. 1733-42.) Such a statement of the basis upon which the court's decision was grounded is not made by the court in its Memorandum Decisions. (Addendum Exs. 3, 4; R. 1685-90.) Thus the Orders substantially and materially differ and fail to conform to the Memorandum Decisions as required by Rule 7(f)(2) of the Utah Rules of Civil Procedure.

Finally, the Orders include an award of attorney's fees in favor of Respondents. (Addendum Exs. 5, 6; R. 1733-42.) The Memorandum Decisions provide no such award. Rather, the award was the creation of counsel for Respondents, not founded upon or in conformity with the Memorandum Decisions. The Orders substantially and materially differ and fail to conform to the Memorandum Decisions as required by Rule 7(f)(2) of the Utah Rules of Civil Procedure.

The Ceas timely filed objections to the form of the Orders on the above-described grounds. The district court, however, signed the Orders without a hearing and without

ruling upon the Ceas' objections. The district court merely redacted the most egregious portions of the Orders, and failed to address in any manner the Ceas' other objections to the form of the Orders.

The district court's Orders should therefore be vacated because the Orders violate Rule 7(f)(2) of the Utah Rules of Civil Procedure and because the Orders were signed by the court without ruling upon the Ceas' objections to the form of the Orders.

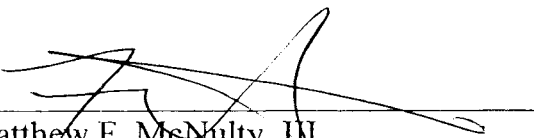
CONCLUSION

For the foregoing reasons, this Court should vacate the orders of the district court granting summary judgment in favor of Respondents and against the Ceas, and remand for further proceedings.

DATED this 23rd day of February, 2011.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By


Matthew F. McNulty, III

Florence M. Vincent

Alex B. Leeman

Attorneys for Plaintiffs/Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February 2011, I served a true and correct copy of the foregoing BRIEF OF PETITIONERS AL CEA AND LAURA CEA upon the following, as follows:

Brad C. Smith
Stevenson & Smith
3986 Washington Blvd.
Ogden, Utah 84403

- ☒ U.S. Mail, First Class Postage Paid
- ☐ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Express Delivery

Attorneys for John Nipko, ATC
Marketing and 18 Plus

Christopher Hill
David M. Wahlquist
Kirtan & McConkie
60 East South Temple, #1800
Salt Lake City, Utah 84145-0120

- ☒ U.S. Mail, First Class Postage Paid
- ☐ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Express Delivery

Attorneys for Modular Manufacturing,
L.L.C., Investors Collaborative, L.L.C.
and Roger Hoffman

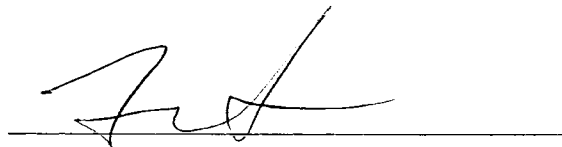
Bryce B. Higbee
727 North 1550 East, #175
Orem, Utah 84097

- ☒ U.S. Mail, First Class Postage Paid
- ☐ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Express Delivery

Attorney for C. Rick Koerber

Mike Nyborg
1478 North Parkway
Centerville, Utah 84014

- ☒ U.S. Mail, First Class Postage Paid
- ☐ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Express Delivery



ADDENDUMS

Addendum 1 – Purchase Agreement R. 29-38

Addendum 2 – The Letter, R. 42

Addendum 3 – Memo Decision re: Hoffman, R. 1685-1687

Addendum 4 – Memo Decision re: Modular, R. 1688-1690

Addendum 5 – Order re: Hoffman 1738-42

Addendum 6 – Order re: Modular, 1733-37

Addendum 7 – Acquisition Agreement(s); R. 1451-1463

ADDENDUM 1

Purchase Agreement

PURCHASER Information

Agreement Number 060306-01

Name: Al and Laura Cea Address: 26725 Rockrose Lane
City: Colton State: California Zip: 95713
Phone: 530-346-6251 Fax: 530-346-6257 email: laurabcea@aol.com

This Sales and Purchase Agreement, executed on June 5, 2006, by and between ATC MARKETING LLC dba AMERICAN TIMBERCRAFT (hereinafter ATC), and Al and Laura Cea (hereinafter PURCHASER), located at the above address is for the sale and purchase of ATC product(s) and service(s) to be installed at an address best described as 30220 Morris Road in the City of Gold Run County of Placer State of California. This purchase and installation shall be known as the Cea Project.

1.0 Products and Services

- 1.1 PURCHASER agrees to purchase the following structure (hereinafter "structure" or "subject structure") from ATC:
One modular log structure, identified by Model Name: Timberlodge
Standard ☐ Modified ☒ Finished Structure ☐ Unfinished ☐ Erected Shell ☒ having
square footages of Living space 2,934 Garage 864 Other ☐
and built in 10 transportable sections for a total of 3,768 TOTAL BUILDING SQUARE FEET.
- 1.2 This structure is to be constructed as per:
a) Plans hereby approved by PURCHASER and agreed to by ATC, which Plans are attached hereto as Exhibit 1 and incorporated herein by reference as a material part of this Agreement;
b) The Schedule of Materials and Services hereby agreed to by PURCHASER and ATC, which Schedule is attached hereto as Exhibit 3 page 1 and 2, and incorporated herein by reference as a material part of this agreement; and
c) The Schedule of Responsibilities hereby agreed to by PURCHASER and ATC, which Schedule is attached hereto as Exhibit 3 page 2, and incorporated herein by reference as a material part of this agreement;
- 1.3 ATC retains all right, title and interest in all materials, results of labor, and structures in accordance herewith until all amounts due are paid in full, in good funds.
- 1.4 All right, title and interest in all materials and in the structure shall be transferred to PURCHASER, or to its designated agent or assignee, upon payment in full of all amounts due under this Agreement, in good funds, to ATC.

2.0 Payment and Pricing

- 2.1 The total sales price is \$ 344,323 as detailed in the Schedule of Materials and Services (Exhibit 3). The total sales price is based upon receipt by ATC of the required down payment of \$ 172,116 on or before June 5, 2006 (date) and a planned initiation of construction on June 20, 2006 (date) for delivery to the installation site on or about August 31, 2006 (date).
- 2.2 Should any payment be delayed for any reason, or should completion of any responsibilities of PURCHASER be delayed or cause a delay in construction, prices are subject to revision by ATC to reflect then-prevailing rates and costs incurred by said delays. Decisions, selections, tasks, and choices of PURCHASER must be completed by the deadlines provided. In a factory environment, construction may proceed very rapidly. Any delay may be critical. A delayed building may cause delays in the construction of other buildings on the manufacturing line, may require the delayed building to be removed from the manufacturing line, and may require re-scheduling the continuation of construction of the delayed building. All remedies for such delays can dramatically affect production costs, and cannot be ignored. This provision is a major and material element of this Agreement and may be strictly enforced by ATC.

initials: ALC/LKC
PURCHASER

Initials: J. O. Z.
ATC

EXHIBIT I

2.3 PURCHASER agrees to pay ATC the following amounts, subject to the following milestones being met:

- a) Initial Payment \$ 138,116 upon execution of this agreement. (\$34,000 Earnest Money Deposit previously received)
- Second Payment \$ 84,058 within five (5) business days of receipt of notice that the building structure is up to square (exterior logs are stacked)
- Final payment \$ 85,846 prior to or upon arrival of the first section of the building structure by truck at the installation site.
- 90%
LHC* 5% PAID AFTER DELIVERY 17211 AND SET

All payments must be in the form of a Certified Cashiers Check to ATC or a confirmed wire transfer to a designated bank account of ATC. No section will be unloaded from the transporting truck or set on the foundation until final payment funds are received by ATC.

b) Notice that a payment is due may be sent to PURCHASER via confirmed facsimile, US mail with return receipt, or email, to the last applicable address provided in writing to ATC. All notices shall be deemed delivered on the earlier of the date that the PURCHASER makes an affirmative acknowledgement of receipt thereof, orally or in writing, or the date that a written confirmation record is created. ATC may also send, by any of the foregoing methods, notice for payments to any entity providing construction financing, which notice shall be deemed as received by PURCHASER.

2.4 In the event that PURCHASER does not make payments as described above, ATC is authorized to cease all work on the subject building and take any and all steps reasonably determined to keep the factory on schedule for its other projects; PURCHASER shall pay a liquidated damage charge of 1% of the payment amount per day of delay, or the actual loss to ATC, whichever is greater, until such payment is received. All such charges must be paid in full before delivery.

2.5 All payments made to ATC are non-refundable, consistent with the provisions of this Agreement.

2.6 If PURCHASER fails to pay any amount due to ATC within five (5) business days of notice thereof, ATC may, at its sole discretion, move structure sections of the project out of the manufacturing line, or continue manufacturing at its own risk, in order to minimize the effect on the manufacturing line, and PURCHASER shall pay a fee of \$1,000 per section as liquidated damages for the cost of risks imposed, disruption of manufacturing crew assignments, stopping the manufacturing line, re-starting the manufacturing line, moving sections in and out of the manufacturing line, or otherwise disrupting the manufacturing process. Scheduled delivery dates shall then become null and void, with delivery to be rescheduled only after payment in full to ATC for all work completed and liquidated damages incurred to that time.

3.0 Termination and Cancellation

3.1 PURCHASER may cancel this Agreement upon two months written notice to ATC, without cause. PURCHASER may terminate this Agreement for cause (e.g. breach of this Agreement) upon one month written notice, and ATC shall have the opportunity to notify PURCHASER within two weeks of actual receipt of such notice that ATC intends to cure the cause, and shall have one month from such notice to PURCHASER to cure. If PURCHASER terminates this Agreement with or without cause, and work has been performed by ATC but is short of a recognized payment event or the like specified hereinabove, PURCHASER shall pay to ATC the *pro rata* amount corresponding to ATC's good faith estimate of the percentage of completion of the final structure and other materials and services that have been provided as of the effective date of such termination. ATC may continue to possess, and shall continue to own all right title and interest in all materials, structures, and labor expended up to and including the effective date of such termination as noticed to ATC until ATC shall have been paid all amounts due to ATC.

4.0 Special Terms

4.1 All changes to this Agreement, including all documents included herein by reference, shall be made only in writing and by written consent of PURCHASER and ATC, and paid for upon submission of such writing to ATC for approval. Any changes not authorized in writing by ATC, affecting structures, engineering, plans, architectural features, or the like referenced by this agreement, and made or caused by PURCHASER or PURCHASER, shall void any and all warranties by ATC, express or implied, and ATC assumes no responsibility therefore.

4.2 Warranty is hereby made by ATC as to compliance of the completed structure with industry standards in accordance with the Limited Warranty provided by ATC and attached hereto as Exhibit 4. No other warranties, express or implied,

Initials: *OAC/LHC*
PURCHASER

Initials: *J.C.N.*
ATC

are made by ATC. ATC hereby disclaims and PURCHASER expressly waives all other warranties. PURCHASER hereby agrees to the provisions of the ATC Limited Warranty (Exhibit 4) attached hereto.

- 4.3 ATC shall not be liable for injury or damage to person or property of PURCHASER, to any other person to whom ATC may sell or transfer possession or ownership of the structure or any portion of the structure, to any employee, invitee, guest, trespasser, or any other person proximate the structure, howsoever caused, and whether such injury results from conditions arising with respect to the structure or any other causation or source. PURCHASER agrees to indemnify and hold harmless ATC against any and all claims and/or damages, including attorney's fees, arising out of, or involving the structure, its installation site, any construction or other activities at the installation site, and the use or occupancy of the structure and installation site.

5.0 Delivery

- 5.1 The scheduled completion date of the structure at the plant is August 25, 2016. PURCHASER shall have the installation site prepared to receive the structures provided by ATC and ready for inspection to verify same by no later than one month prior to the scheduled completion date. PURCHASER shall timely correct, upon notice from ATC, any defects affecting the ability of ATC to deliver and set the structures at the installation site. PURCHASER understands and agrees that this scheduled completion date of ATC is subject to many events and actions over which ATC has no control. ATC will make commercially reasonable efforts to notify PURCHASER of any material changes anticipated to affect the scheduled completion date. ATC shall pay a penalty of \$100 per day for any actual delay so identified by ATC over which ATC has control.
- 5.2 Delivery shall be made to the installation site specified herein only upon completion of the site work in preparation for setting the structure. Should the subject structure corresponding to this agreement be completed on or after the scheduled delivery date, but before the site is ready to accept the structure, ATC shall prepare the structure for shipment and move the structure either to a location near its facility; or, at the PURCHASER'S request, to an alternative site. Should ATC store the structure at its facility for longer than two weeks after the structure has been prepared for shipment, PURCHASER shall incur a storage rental charge of \$100 per day for every day, or part thereof, that the structure remains in storage by ATC.
- 5.3 Delivery shall be made only when all sections of the subject structure are complete.
- 5.4 Upon completion of the structure and preparation for shipment, if PURCHASER is not ready to take delivery, seventy five percent of the final payment specified herein above shall be due and payable to ATC.
- 5.5 ATC includes freight and insurance for the full replacement value of the structure and delivery as part of its services. All freight and delivery costs contained herein, or otherwise quoted, are contingent upon the suitability of the roads, are best estimate by ATC at the time of this Agreement, and are in no way binding upon ATC. PURCHASER shall pay for any increase in freight and delivery costs and ATC shall credit PURCHASER for any decrease in freight and delivery costs. In the event of damage in shipping, the liability of ATC shall be limited to replacement of the structure for PURCHASER within a reasonable period of time following receipt of the insurance proceeds by ATC.
- 5.6 In the event that PURCHASER, at its election and with the consent of ATC, takes possession of the structure at the manufacturing plant, or elsewhere as otherwise agreed in writing between, ATC and PURCHASER, ATC shall have no further responsibility under this Agreement.
- 5.7 Delivery Instructions shall be timely provided to ATC by PURCHASER.
- a) PURCHASER shall provide to ATC at least two weeks prior to the scheduled completion date a map and instructions to guide trucks to the installation site, with specific instructions as appropriate for navigating about and upon the installation site with long, low, semi-tractor-trailer rigs carrying oversize loads.

b) Specific Location

Address / Lot Number 30220 Magma Rd.

City Gold Run County Placer State California

initials: ARC/line
PURCHASER

Initials: JCS
ATC

5.6 PURCHASER agrees that ATC retains all authority over the provider of transportation of the structure to the site and over the provider of crane services at the site. All instructions to the transport company and to the crane company, shall come only from a principal of ATC or their agent, so authorized in writing. All contractors working under the responsibility and direction of ATC shall provide proof of insurance for their respective tasks.

6.0 On-Site Work

6.1 All preparatory site work, including, but not limited to sewer and waterlines, electrical and/or gas lines, excavating, footings and foundation, sub-plumbing and backfill is the responsibility of Purchaser. Refer to the Responsibility Sheet-Exhibit 3.

6.2 ATC has no other responsibility for site work unless separately contracted between ATC and Purchaser.

6.3 Purchaser agrees that all site work not performed by ATC will be performed by qualified and appropriately licensed contractors in compliance with the building code standards and requirements of the jurisdiction and pursuant to all issued permits and/or licenses required in that jurisdiction and all inspections with respect thereto.

7.0 Change Orders

7.1 No alterations or modifications to any structures, materials, tasks, dates, or dollar amounts under this agreement shall be made, except by a written Change Order signed by a principal of ATC, and PURCHASER. Such a Change Order, properly executed, may include any revision to materials, structures, dates, prices, and the like.

8.0 Documents, Information, Approvals

8.1 PURCHASER agrees to provide to ATC, promptly upon request, all documents, information, approvals, permits and licenses necessary for completion of the building structure and site work, authorization and supporting information required to comply with financing agencies, and the like required for the completion of ATC obligations herein, and compliance herewith is solely the responsibility of PURCHASER. PURCHASER shall not fail to obtain nor shall PURCHASER withhold such documents, information, approvals, permits and licenses; any failure to so comply with a request of ATC shall authorize ATC to suspend work on the structure without further obligation or liability upon ATC.

9.0 Patents, Trade Secrets, Trademarks, Copyrights and other Intellectual Property

9.1 PURCHASER agrees that it will use all commercially reasonable efforts and exercise the highest degree of care to protect patents, trade secrets, trademarks, goodwill, copyrights, and other intellectual property rights of ATC and its licensors. PURCHASER will take suitable precautions as required at law and by contract to protect Trade Secrets, and will not use them for any purpose other than to comply with this Agreement, and will not disclose them to any third party without prior written authorization from ATC.

9.2.1 PURCHASER agrees that ATC has a license to manufacture under U.S. Patent No. 5,058,343, which license and patent are hereby acknowledged by PURCHASER to be valid and enforceable. PURCHASER agrees that it shall not, nor aid any other party, to make, use, sell, or offer for sale any product falling within the scope of said patent, except products provided by ATC. PURCHASER hereby agrees that all papers, communications, brochures, writings, charts, information, plans, specifications, designs and the like provided by ATC are the property of ATC and/or one or more licensors of ATC and are protected under intellectual property laws of the United States and of its various states. Any unauthorized use or breach of this provision of this Agreement shall entitle ATC to all damages arising there from, and shall not preclude any additional remedy available to licensors of ATC. Notwithstanding any damages available PURCHASER, PURCHASER hereby agrees that money damages cannot alone make ATC and its licensors whole, and therefore consents to entry, of an *ex parte* Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction against PURCHASER requiring immediate cessation of all activity in violation of this provision.

10.0 Governing Law and Venue

10.1 The terms of this Agreement, and any dispute arising hereunder, shall be governed by the laws of the State of Utah without regard to conflict of law provisions, and all parties herein consent to jurisdiction and venue in the courts of and for the State of Utah.

Initials: 
PURCHASER

Initials: 
ATC

11.0 Arbitration/Legal Recourse, Attorney's Fees and Legal Costs

11.1 Any dispute between ATC and PURCHASER shall be resolved solely by arbitration, in accordance with construction industry arbitration rules of the American Arbitration Association then in effect. Any party may commence arbitration by request to the American Arbitration Association and payment of its initial fees. The award of the arbitrator(s) shall be final and binding on the parties and may be entered as a judgment in the jurisdiction in the State of Utah provided for under this Agreement and may be immediately domesticated in any other jurisdiction in which a non-prevailing party is found or domiciled. The award of the arbitrator(s) shall include reasonable attorney's fees, expenses, and all costs, including but not limited to, those costs incurred by accountants, investigators and experts to be awarded to the prevailing party.

12.0 Waiver and Modification

12.1 The waiver of any party hereto of any instance of performance or breach by another party of any term or condition hereof shall not be deemed a waiver of such term or condition. No provision of this Agreement shall be deemed waived or modified unless a written instrument shall evidence such waiver or modification signed by all parties to this Agreement. Any such waiver or modification shall apply only to such terms or conditions expressly noted in said written instrument.

13.0 Language and Terms

13.1 All language in this Agreement is defined by common usage unless specifically defined otherwise in this Agreement. Completion of any task and cure of any breach, not having another deadline under this Agreement, within two weeks of notice thereof by ATC, shall be *per se* prompt and timely. Failure to complete any task and cure any breach, not having another deadline under this Agreement, within one month of written notice thereof by ATC, shall be *per se* untimely and shall constitute non-performance. A day corresponding to any date material to this contract is deemed to end at 5:00 pm Mountain Time. Any term of this Agreement binding on a party hereto is deemed binding on all agents, principals, heirs, assigns, and successors in interest of that party.

14.0 Invalid Provisions

14.1 If any provision of this Agreement shall be declared invalid, illegal, or contrary to law, the parties hereto agree that such provision shall be disregarded and this Agreement shall continue in force as though such provision had not been incorporated herein.

15.0 Notices

15.1 Any notice, under this Agreement and not otherwise specified, may be sent via hand delivery, via confirmed facsimile, via U.S. mail with return receipt requested, or via email, to the last applicable address provided in writing to ATC. Any notice shall be deemed delivered on the earlier of 1) in the case of any means of notice, the date that the receiving party makes an affirmative acknowledgment in writing confirming receipt thereof, 2) in the case of email, the date that a confirming email is received by the original sender from the original recipient of said notice, 3) in the case of facsimile transmission, the date that a written confirmation record of such receipt is created by a facsimile machine of sender, or 4) in the case of U.S. Mail with return receipt requested, the delivery date as identified on the return receipt created by the U.S. Postal Service. Any address may be changed by notice to any party in the manner prescribed above.

16.0 Entire Agreement

16.1 This instrument contains the entire agreement between the parties relating to the subject matter hereof and supersedes all, if any prior agreements, arrangements, promises or representations. Neither this Agreement nor any term hereof may be modified, omitted, waived, discharged or terminated, except by a written instrument signed by all parties hereto who are obligated thereby.

17.0 NOTICE OF ACCEPTANCE: COUNTERPARTS

17.1 This Agreement is a unilateral contract and shall expire at 5:00 pm Mountain Time five business days after the first date written hereon unless executed by PURCHASER as evidenced by an authorized signature below, and the offering party receives notice of such acceptance on or before June 5, 2006 (Acceptance deadline).

Initials: adl/lhc
PURCHASER

Initials: J. P. R.
ATC

17.2 A duplicate original of this document may be executed by any party hereto, and multiple duplicate originals shall be considered a single, integrated Agreement between the parties. Facsimile copies of original signatures shall be binding on the parties and originals thereof shall be provided to the other parties within five (5) business days.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date first written above.

Signed and approved by:

ATC MARKETING LLC

SIGNATURE

NAME

TITLE

DATE

PURCHASER:

SIGNATURE

Name

TITLE

Date

SIGNATURE

Name

TITLE

Date

Initials:

PURCHASER

Initials:

ATC

AME CAN TIMBERCRAFT

2382 North 1500 West, Fair West, Utah 84404

Al & Laura Cee

EXHIBIT 3 Page 1 of 3

TRADITIONAL SHELL - Materials and Services Provided

Agreement Number

060306-01

STANDARD MATERIAL SPECIFICATIONS

MATERIALS

Swedish Cope Lodgepole Pine Logs

(Milled Logs)

Preservative Sealed

Weatheral Log Guard or suitable substitute

Interior walls framed only

2 Log Stairway to loft with milled log railing

ROOF INSULATION

R-26, Rigid Foam, 4 inches

(higher R values may be specified)

PLUMBING

Rough only

ILLWORK AND FINISH HARDWARE

Steel insulated 6-panel exterior doors with locksets

Front door \$350 Allowance

H.V.A.C.

Rough only

In-floor Radiant Heat

ROOFING

Year Architectural Composite

(other roofing may be specified)

APPLIANCES

Purchaser provided

WINDOWS

Operable windows are double pane, low e Vinyl

Fixed windows are double pane, low e glass

Purchaser to provide finish trim

WALL TILE

Purchaser provided

FLOORING

Purchaser provided

DECKS AND PORCHES

Redwood Decking (optional)

CABINETS

Purchaser provided

CEILING

Open beam tongue & groove

All Materials Exceed FHA Standards

Initials

SEALER

J.D.H.

Initials

OWNER

ALC/LAC

Description	Center Resp.	OWNER Resp.	MANAGE. Resp.	Estimated Amount
1 Plans and Engineering			incl.	-
2 Stake out Site				-
3 Permits				-
4 Excavation				-
5 Clear Land				-
6 Well and Water Line				-
7 Septic				-
8 Sewer Line				-
9 Power Line				-
10 Driveway				-
11 Gas Line				-
12 Phone Line				-
13 Footers				-
14 Basement Bath Rough In				-
15 Footer Plate Installation			0	-
16 Foundation or Frost Wall				-
17 Foundation or Frost Wall Install				-
18 Damp Proofing				-
19 Backfill				-
20 Basement				-
21 Basement Siding				-
22 Garage Floor				-
23 Garage Drywall				-
24 Piers 4				-
25 Pier Installation				-
26 Garage Doors w/Openers				-
27 Garage on-site build				-
28 Home			incl.	-
29 Decks				-
30 Transportation			incl.	-
31 Set			incl.	-
32 Crane			incl.	-
33 Tap Fees (no coordination fee)				-
34 Meter Base/Electrical Hook-ups				-
35 Stitch				-
36 Set Decks				-
37 Provide Extra Equipment for set				-
38 Final Grade				-
39 Plumbing Hookup				-
40 Temporary Power				-
41 Clean-up				-
42 Porta-Potty				-
43 Builders Risk				-
0 TOTAL	-	-	-	-
1 Contingency	-	-	-	-
0 TOTAL ALLOWANCES	-	-	-	-
* 15% Coordination Fee				-
TOTAL ESTIMATED ONSITES				Estimate only
Personal Custom Quote (factory cost)				301,945.13
Options not in Personal Custom Quote				42,288.00
Total Personal Custom Quote				344,233.13
GRAND ESTIMATED TOTAL				344,233.13

Initials

Joe M
"ATCM"

Initials

ALC/LAC
"OWNER"

AME. CAN TIMBERCRAFT
 2382 North 1500 West, Farr West, Utah 84404
EXHIBIT 3 Page 3 of 3

Customer: Al & Laura Cea
 Model: Timberlodge - Custom
 Option: Shell Only with Detached Garage
 Location: Gold Run, CA

Quote No: 060306-01
 Quoted By: Mike Nyberg
 Quote Date: 6/3/2006
 Sq. Ft. Main & Upper 2,904
 Sq. Ft. Fin. Bsmt. 0
 Sq. Ft. Garage: 864
 Total S.F. 3,768
 Price

submit the following proposal for your review and acceptance:

Base Structure:

91,357

Base Price			
Main Level	0	2,568 sq ft	221,336
Upper Level	0	336 sq ft	32,019
-		0	0
-		0 ln ft	0
Fin. Bsmt		0 sq ft	0
-		0 sq ft	0
Garage Main		864 sq ft	36,227
-			0
-			0
-			0
-			0
-			0
Gross Base Price			289,582

Options Requested:

Porch		108 sq ft	4,254
Deck		0 sq ft	0
Handrail		0 ln ft	0
Extra log course in Great Room			3,064
Additional 2" Roof Insulation			5,045
-			0
-			0
Gross Options Price			12,363

Stitch/Decks			0
Onsites (See Page 2)			0
Crane Time			4,500
Foundation, Basement and Deck piers			0
Delivery 8 Sections			30,288
Set, Level and Bolt 10 Sections			7,500
TOTAL			42,288

State Sales Tax	Not Included		0
GRAND TOTAL			344,233

does not include: Site Preparation, Site Cleanup, Foundations, Permits, Meter Base, Decks or Porches unless specified
 re, Utility Hook-up, Stitching or Crane Time

Accepted By

J.A.N.
 "ATCH"
Al Cea
 "OWNER"

Date 6/5/2006
 Date 6-7-06

"When you want your dream to last forever"

EARNEST MONEY AGREEMENT

Al + Laura Cea (Purchaser) agrees to purchase and ATC MARKETING LLC dba AMERICAN TIMBERCRAFT (ATC) agrees to sell to Purchaser a Timberlodge Custom model log home.

Purchaser deposits with Seller a NON-REFUNDABLE deposit representing 10% (ten percent) of the estimated purchase price, as detailed in the attached Personal Custom Quote (PCQ).


ESTIMATED PRICE OF LOG HOME \$ 330,391

EARNEST MONEY AMOUNT (10% of above) \$ 34,000

The Earnest Money Amount represents a partial payment of the final purchase price and will be applied to the final purchase price, as will all other amounts previously paid, if any, for building plans or reservation deposits. The final purchase price has not been determined as of this date as plans, specifications and engineering have not been finalized. Once these matters are finalized, the final purchase price will be determined and all terms of the purchase will be subject to the Sales and Purchase Agreement, a copy of which, Purchaser acknowledges having received with this agreement.

By accepting this earnest money, ATC agrees to prepare and deliver engineered plans to Purchaser, reserve a delivery date for Purchaser's home within 30 days of Aug. 23, 2006 2006.

Date: 3/23/06


Purchaser Signature

AL + LAURA CEA
Purchaser Name (Please Print)

26735 ROCKROSE LN Address


COLDEX CA 95713 City, State, ZIP

(530) 210-1961 (LAURA'S CELL)
(530) 346-6251 Phone laurahcea@aol.com Email address

(530) 263-2313 (AL'S CELL)

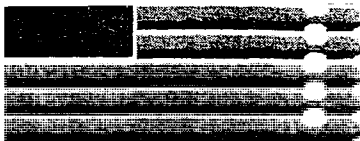
Date: 3/23/06

Accepted By:


American TimberCraft Signature

Mike Nyberg, VP Sales
American TimberCraft Representative/Title

ADDENDUM 2



MODULAR MANUFACTURING LLC

2382 N 1500 W Ogden, Ut. 84404 (801)782-7820 Fax (801)782-7587

(801) 394-5647

Dear Valued Customer:

As you may be aware, ATC Marketing, LLC, the owner of American TimberCraft has ceased operations effective November 12, 2006 and has liquidated all company assets. While this move was a difficult decision for ATC, financial reasons dictated that this route was necessary.

As a customer of ATC Marketing we wanted to take a moment and explain how this situation affects you. Obviously with the dissolution and liquidation of ATC Marketing, the company is no longer capable of completing or performing on its contract with you. However, all is not lost.

Modular Manufacturing, LLC has acquired the bulk of ATC assets including plant equipment, all proprietary property and the trade name of "American TimberCraft." Although Modular Manufacturing did not purchase ATC Marketing itself as part of the asset acquisitions, Modular agreed to complete all work in progress, including orders for which deposits have been taken (even if no physical work has commenced). Therefore if you had an order with ATC Marketing, Modular has agreed to complete the work on your home for the previously agreed price, even though it did not acquire your actual contract from ATC Marketing.

At this point in time we (as Modular Manufacturing) will be issuing new contracts for your home construction regardless of what stage of construction it may be in) in order to complete and give you the assurance of a valid contract for performance. In lieu of a new contract we will be willing to pay you whatever deposits or payments you have made to ATC Marketing for your home should you decide that you would prefer to cancel and just walk away. We fully understand your frustration with all the apparent past delays and at this point want to pursue a course most amenable to you.

If you decide that you would like to proceed, enter into a new contract and have your home completed, there will be some minor modifications to terms and payment schedules. However the specifications for the home itself will not change nor will the price.

We apologize for any stress or inconvenience this situation may cause, but in the long run we feel that you will be satisfied with the results. For one thing we will be able to give you a new and *firm* completion date and will be able to provide you with higher quality assurance and standards.

YMS

ADDENDUM 3

AUG 19 2010
DISTRICT COURT

AUG 19 2010

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
COUNTY OF WEBER, STATE OF UTAH**

AL CEA, et al.,
Plaintiff,

vs.

ATC MARKETING, L.L.C., et al.,
Defendant.

**MEMORANDUM DECISION
RE; DEFENDANT HOFFMAN**

Case Number: 080901240

Judge Pamela G. Heffernan

Defendant Hoffman, filed a Motion and Memorandum for Summary Judgment on December 23, 2009. Plaintiff filed a Memorandum in Opposition on January 15, 2010 and January 22, 2010 (Amended Memorandum). Defendant filed a Reply Memorandum on February 5, 2010.

Oral arguments were heard on July 13, 2010, after a Notice to Submit was filed. Plaintiff was present and represented by Attorney Florence Vincent. Defendant Hoffman was represented by Attorney Christopher Hill.

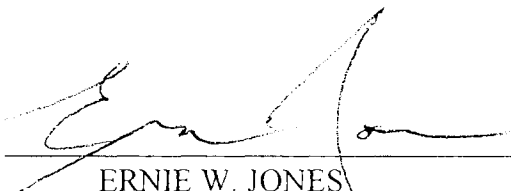
The court having read the memorandum and having heard the arguments of counsel rules as follows:

1. The court finds the defendant Hoffman is not personally liable. Defendant Hoffman only signed on as an agent for the defendant Modular Manufacturing. Defendant Hoffman never made any representations to the Plaintiffs.
2. The court finds the letter dated November 12, 2006 is not an agreement or guarantee. The letter contemplates that future contracts will be issued for construction of the log home. The letter is not a guarantee. It lacks any consideration. Defendant Hoffman never signed the letter and there is no reference to Defendant Hoffman in the letter.
3. The Court finds there is no evidence of fraud or misrepresentation by Defendant Hoffman. Defendant Hoffman never spoke to Plaintiffs or communicated with Plaintiffs, therefore, no fraud or misrepresentation exists by Defendant Hoffman.

Decision
Al Cea vs ATC Marketing.
Case Number 080901240
Page Two

4. The court will grant Summary Judgment for Defendant Hoffman as to the seventh cause of action (Breach of Contract), eighth cause of action (Fraud) and ninth cause of action (Negligent Misrepresentation).
5. Defendant Hoffman will prepare an order for the court to sign.

Dated this 19 day of August, 2010.



ERNIE W. JONES
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, first class mail and postage prepaid, to the following parties this 20th day of August, 2010.

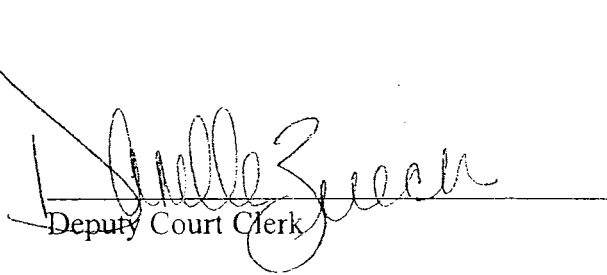
Florence M. Vincent
Vancott, Bagley, Cornwell & McCarthy
36 South State Street, Ste 1900
Salt Lake City, Utah 84111

Brad C. Smith
Stevenson & Smith
3986 Washington Boulevard
Ogden, Utah 84403

Mike Nyborg
1478 North Parkway
Centerville, Utah 84403

Christopher S. Hill
Kirton & McConkie
P.O. Box 45120
Salt Lake City, Utah 84145

Rick Koerber
FranklinSquires Investments, LLC
1001 N Ft Canyon Road
Alpine, Utah 84004


Deputy Court Clerk

ADDENDUM 4

W

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
COUNTY OF WEBER, STATE OF UTAH

AL CEA, et al.,
Plaintiff,

vs.

ATC MARKETING, L.L.C., et al.,
Defendant.

AUG 13 2010

**MEMORANDUM DECISION
RE: MODULAR
MANUFACTURING LLC and
INVESTORS COLLABORATIVE
LLC**

Case Number: 080901240

Judge Pamela G. Heffernan

On December 24, 2009 Defendant Modular Manufacturing and Investors Collaborative filed a Motion for Summary Judgment. A memorandum was also submitted.

The Plaintiff filed a Memorandum in Opposition on January 15, 2010.

Defendant Modular Manufacturing and Investors Collaborative filed a reply memorandum on February 8, 2010.

A Notice to Submit was filed on February 26, 2010. Oral arguments were heard on July 13, 2010.

Plaintiffs were present and represented by Attorney Florence Vincent. Defendants were represented by Attorney Christopher Hill. The Court having read the memorandum and having heard the oral arguments of counsel rules as follows:

The Court finds that,

1. The letter dated November 12, 2006 is not an agreement. The letter is too indefinite and uncertain in its terms. The letter is not a guarantee. It just provides an option to enter into a new contract in the future. The letter is

not a binding contract.

2. The Court finds there is no fraud or negligent misrepresentations by these defendants. There is no evidence that these defendants made any representations to the Plaintiffs that were fraudulent or negligent misrepresentations.

3. The Court finds there was no contact with the Plaintiffs by Defendants Investors Collaborative. Investors Collaborative made no statements to Plaintiffs.

4. The Court finds that Investors Collaborative is not liable for the conduct of Modular Manufacturing.

5. Investors Collaborative did not enter into the letter of November 12, 2006. Investors Collaborative did not enter into contract with the Plaintiff.

6. The Court will grant Summary Judgment to Defendant Modular Manufacturing and Investors Collaborative as to:

Breach of Contract, Seventh cause of action


Fraud, eighth cause of action

Negligent Misrepresentation, ninth cause of action.

There is no dispute as to material facts.

7. Defendant will prepare an order for signature by the Court.

Date this 19 of August, 2010.



ERNIE W. JONES
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, first class mail and postage prepaid, to the following parties this 20th day of August, 2010.

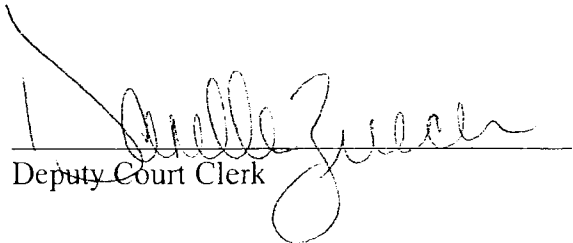
Florence M. Vincent
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36 South State Street, Ste 1900
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3986 Washington Boulevard
Ogden, Utah 84403

Mike Nyborg
1478 North Parkway
Centerville, Utah 84403

Christopher S. Hill
Kirton & McConkie
P.O. Box 45120
Salt Lake City, Utah 84145

Rick Koerber
FranklinSquires Investments, LLC
1001 N Ft Canyon Road
Alpine, Utah 84004


Deputy Court Clerk

ADDENDUM 5

SEP 28 2010
SECOND
DISTRICT COURT

SEP 28 2010

David M. Wahlquist (#3349)
Christopher S. Hill (#9931)
KIRTON & McCONKIE
60 East South Temple, #1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893
dwahlquist@kmclaw.com
chill@kmclaw.com

*Attorneys for Defendants
Modular Manufacturing, LLC, Investors
Collaborative, LLC and Roger Hoffman*

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

AL CEA, et al.,

Plaintiffs,

v.

ATC MARKETING, L.L.C., et al,

Defendants.

**[PROPOSED] ORDER GRANTING
DEFENDANT ROGER HOFFMAN'S
MOTION FOR SUMMARY JUDGMENT**

Civil No.: 080901240

Judge Pamela G. Heffernan

Defendant Roger Hoffman's ("Hoffman") Motion for Summary Judgment (the "Motion") came on for hearing on for hearing on July 13, 2010 before the Honorable W. Jones. Christopher S. Hill of Kirton & McConkie appeared on behalf of Defendant Hoffman; Florence M. Vincent of Van Cott Bagley Cornwall & McCarthy appeared on behalf of the Plaintiffs Al and Laura Cea (the "Ceas"). Having reviewed Hoffman's memoranda in support of the Motion and Ceas'

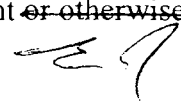
memorandum in opposition, having heard the oral argument of counsel and being fully briefed in all matters pertaining hereto, and having issued a memorandum decision on August 19, 2010, the Court hereby enters the following conclusions of law and order:

CONCLUSIONS OF LAW

1. Based upon the undisputed facts that Hoffman never made any personal representations to the Ceas and that any action by Hoffman was limited to his capacity as a representative of the entity, the Court concludes that Hoffman is not personally liable for the actions of Modular Manufacturing, LLC ("Modular") and/or Investors Collaborative, LLC ("Investors").

2. Based upon the undisputed facts regarding the content and issuance of the letter dated November 12, 2006 (the "Letter") that is the subject of the Ceas's Complaint against Hoffman, including that the Letter contemplated future contracts, that there was no consideration for the Letter, and that Hoffman did not sign the Letter nor was he referenced therein, the Court concludes that the Letter does not constitute a contract, agreement or a guaranty.

3. Based on the undisputed fact that Hoffman never made any representations to Ceas or communicated with the Ceas in any regard, the Court concludes that Hoffman did not commit a fraud or make any misrepresentation (negligent ~~or otherwise~~) to the Ceas.



ORDER

Based upon these conclusions and Hoffman's supporting memoranda, the Court hereby:

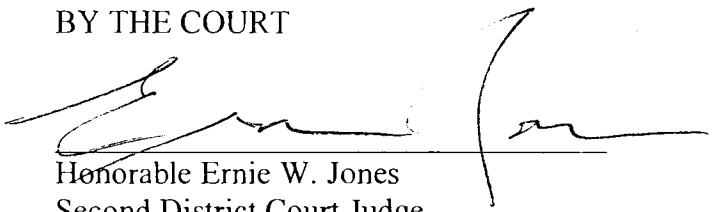
1. GRANTS Hoffman's Motion for Summary Judgment in its entirety and enters a judgment of dismissal in favor of Hoffman and against the Ceas, dismissing with prejudice Plaintiffs' Seventh Cause of Action (Breach of Contract), Eighth Cause of Action (Fraud) and Ninth Cause of Action (Misrepresentation) as to Defendant Hoffman.

2. It is further ordered that Plaintiffs' Motion to Compel, filed on or about March 31, 2010, is MOOT. The hearing on that motion, which is set for October 26, 2010, is hereby stricken.

3. As between Hoffman and the Ceas, Hoffman is the prevailing party. As such, Hoffman is entitled to an award of his costs incurred in this matter pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure. Hoffman may serve and file his request for costs in accordance with Rule 54(d)(2) within five business (5) business days after the entry of this order. The amount requested may be done jointly with Modular and Investors in a single memorandum of costs.

DATED this 28 day of Sept, 2010.

BY THE COURT


Honorable Ernie W. Jones
Second District Court Judge

This Order Granting Roger Hoffman's
Motion for Summary Judgment is approved as to form:

KIRTON & McCONKIE

By: _____
Christopher S. Hill
Attorneys for Defendants
Modular Manufacturing, LLC, Investors
Collaborative, LLC and Roger Hoffman

VAN COTT BAGLEY CORNWALL & McCARTHY

By: _____
Florence M. Vincent
Attorneys for Plaintiffs
Al and Laura Cea

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of August, 2010, I caused a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING DEFENDANT ROGER HOFFMAN'S MOTION FOR SUMMARY JUDGMENT** to be delivered in the following manner:

Matthew F. McNulty, III
Florence M. Vincent
VANCOTT, BAGLEY,
CORNWALL & McCARTHY
36 South State Street, #1900
Salt Lake City, Utah 84111

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Rick Koerber
6248 Lone Rock Road
Highland, UT 84003-3723

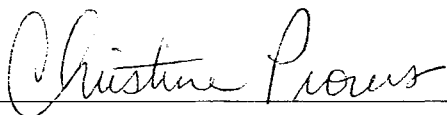
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Mike Nyborg
1478 North Parkway
Centerville, UT 84014

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Brad C. Smith
STEVENSON & SMITH, P.C.
3986 Washington Boulevard
Ogden, UT 84403

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



ADDENDUM 6

36

SEP 21 2010
SECOND
DISTRICT COURT
SEP 21 2010

David M. Wahlquist (#3349)
Christopher S. Hill (#9931)
KIRTON & McCONKIE
60 East South Temple, #1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893
dwahlquist@kmclaw.com
chill@kmclaw.com

*Attorneys for Defendants
Modular Manufacturing, LLC, Investors
Collaborative, LLC and Roger Hoffman*

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH


AL CEA, et al., Plaintiffs, v. ATC MARKETING, L.L.C., et al, Defendants.	[PROPOSED] ORDER GRANTING DEFENDANTS MODULAR MANUFACTURING, LLC AND INVESTORS COLLABORATIVE, LLC'S MOTION FOR SUMMARY JUDGMENT Civil No.: 080901240 Judge Pamela G. Heffernan
--	--

Defendants Modular Manufacturing, LLC ("Modular") and/or Investors Collaborative, LLC ("Investors") Motion for Summary Judgment (the "Motion") came on for hearing on for hearing on July 13, 2010 before the Honorable Ernie W. Jones. Christopher S. Hill of Kirton & McConkie appeared on behalf of Defendants Modular and Investors; Florence M. Vincent of Van Cott Bagley Cornwall & McCarthy appeared on behalf of the Plaintiffs Al and Laura Cea

(the "Ceas"). Having reviewed Modular and Investors's joint memoranda in support of the Motion and Ceas' memorandum in opposition, having heard the oral argument of counsel and being fully briefed in all matters pertaining hereto, and having issued a memorandum decision on August 19, 2010, the Court hereby enters the following conclusions of law and order:

CONCLUSIONS OF LAW

1. Based upon the undisputed facts that Investors never made any representations to the Ceas, and that any action by Investors was limited to its capacity as a representative of Modular, the Court concludes that Investors is not personally liable for the actions of Modular.
2. Based upon the undisputed facts regarding the content and issuance of the letter dated November 12, 2006 (the "Letter") that is the subject of the Ceas's Complaint against Modular and Investors, including that the Letter contemplated future contracts, that there was no consideration for the Letter, and that the Letter is too indefinite and uncertain in its terms, the Court concludes that the Letter does not constitute a contract, agreement or a guaranty.
3. Based on the undisputed fact that Investors never made any representations to Ceas or communicated with the Ceas in any regard, the Court concludes that Investors did not commit a fraud or make any misrepresentation (negligent or otherwise) to the Ceas.
4. Based on the undisputed facts regarding the content and issuance of the Letter and in the absence of any evidence to the contrary, the Court concludes that Modular did not commit a fraud or make any misrepresentation (negligent or otherwise) to the Ceas.



ORDER

Based upon these conclusions and Modular and Investors's supporting memoranda, the Court hereby:

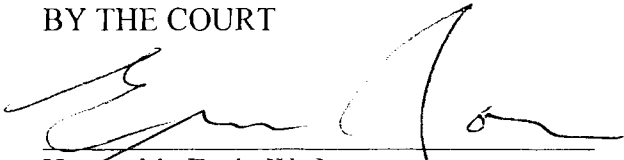
1. GRANTS Modular and Investors's Motion for Summary Judgment in its entirety and enters a judgment of dismissal in favor of Modular and Investors and against the Ceas, dismissing with prejudice Plaintiffs' Seventh Cause of Action (Breach of Contract), Eighth Cause of Action (Fraud) and Ninth Cause of Action (Misrepresentation) as to Defendants Modular and Investors.

2. ~~It is further ordered that Plaintiffs' Motion to Compel, filed on or about March 31, 2010, is MOOT. The hearing on that motion, which is set for October 26, 2010, is hereby stricken.~~

3. ~~As between Modular and Investors and the Ceas, Modular and Investors are the prevailing parties. As such, Modular and Investors are entitled to an award of their costs incurred in this matter pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure. Modular and Investors may serve and file their request for costs in accordance with Rule 54(d)(2) within five business (5) business days after the entry of this order. The amount requested may be done jointly with Roger Hoffman in a single memorandum of costs.~~

DATED this 28 day of Sept, 20 10.

BY THE COURT


Honorable Ernie W. Jones
Second District Court Judge

This Order Granting Modular Manufacturing, LLC and Investors
Collaborative, LLC Motion for Summary Judgment is approved as to form:

KIRTON & McCONKIE

By: _____
Christopher S. Hill
Attorneys for Defendants
Modular Manufacturing, LLC, Investors
Collaborative, LLC and Roger Hoffman

VAN COTT BAGLEY CORNWALL & McCARTHY

By: _____
Florence M. Vincent
Attorneys for Plaintiffs
Al and Laura Cea

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of August, 2010, I caused a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING DEFENDANTS MODULAR MANUFACTURING, LLC AND INVESTORS COLLABORATIVE, LLC'S MOTION FOR SUMMARY JUDGMENT** to be delivered in the following manner:

Matthew F. McNulty, III
Florence M. Vincent
VANCOTT, BAGLEY,
CORNWALL & McCARTHY
36 South State Street, #1900
Salt Lake City, Utah 84111

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Rick Koerber
6248 Lone Rock Road
Highland, UT 84003-3723

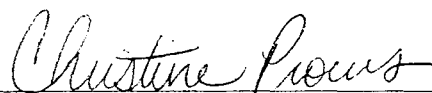
☒ U.S. Mail, Postage Prepaid
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Mike Nyborg
1478 North Parkway
Centerville, UT 84014

☒ U.S. Mail, Postage Prepaid
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☐ Facsimile

Brad C. Smith
STEVENSON & SMITH, P.C.
3986 Washington Boulevard
Ogden, UT 84403

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Christine Proulx

ADDENDUM 7

Work in Progress Buy - Sell Agreement

COMES NOW, **Modular Manufacturing, LLC**, a Utah limited liability company, hereinafter referred to as "Modular" and **ATC Marketing, LLC**, a Utah limited liability company, together with and doing business as **American TimberCraft**, hereinafter collectively referred to as "ATC" and John & Carolie Nipko, agree as follows:

W I T N E S S

WHEREAS, ATC is a modular log construction company in Farr West, Utah; and

WHEREAS ATC presently has manufacturing work in progress and pending orders, as itemized on Exhibit "A" which is attached hereto and incorporated herein; and

WHEREAS ATC is desirous of closing its operations and dissolving its business but at the same time is desirous of seeing its present work in progress and pending orders completed for its customers; and

WHEREAS, Modular is a log construction company and is desirous of acquiring from ATC its work in progress and pending orders along with all related deposits and down payments;

NOW, THEREFORE, in consideration of the mutual terms, covenants and conditions hereinafter set forth, the parties agree as follows:

- 1) Modular shall acquire from ATC all work in progress and pending orders as defined on Exhibit "A."
- 2) The established value of that work in progress and pending orders shall be (\$ 18,098.69) + OVERHEAD
- 3) Upon transfer and in consideration of value received by Modular from ATC's transfer of that certain Property to Modular as defined herein, Modular shall convey to ATC an interest in Modular as set forth in Modular's Operating Agreement (separate document). Said value, as stipulated in Paragraph 2 herein, shall be considered the basis for ATC's or assigns Capital Account as defined in Operating Agreement (separate document).
- 4) Under the terms of this Agreement, Modular is only acquiring the actual work in progress and pending orders as described herein. Modular is not acquiring or purchasing the business entity or ATC operation. As such ATC warrants under this Agreement that all such work in progress, pending orders and deposits / down payments being transferred as described herein, is free and clear of any liens, encumbrances, debts and the like other than that described in Exhibit "A."
- 5) ATC and John & Carolie Nipko, jointly and severally, hereby hold harmless and indemnifies Modular from any and all claims that may be presently asserted against ATC and / or Nipko or that may in the future be made against ATC and / or Nipko or Modular as a result of any business activities of ATC and / or Nipko

prior to the acquisition herein defined. Nipko, under this provision for indemnification, shall have the first right to tender any defense as may be required, upon written notice from Modular, which notice Modular shall be required to give in such an event.

- 6) Liabilities of ATC and / or Nipko shall remain those of ATC and / or Nipko and shall not pass through to Modular as a result of the acquisition herein defined, except as specifically provided herein and specifically noted in Exhibit "A."
- 7) Execution of this Agreement by the parties hereto shall constitute transfer of all work in progress, pending orders and deposits or down payments as defined herein and shall constitute assumption by Modular of ATC liabilities as they may pertain to that respective work in progress as defined in Exhibit "A" herein. Additionally, fulfillment of full consideration by Modular to ATC as defined herein shall be considered complete.
- 8) If either party seeks the services of an attorney to enforce any provision of this Agreement, the prevailing party in such action shall have the right to collect reasonable attorney fees and court costs from the non-prevailing party, both as to trial and on appeal.
- 9) This Agreement shall inure to the benefit of the respective parties, their heirs, assigns, personal representatives and successors in interest.
- 10) This Agreement shall be deemed to have been fully executed upon the date of final / last signature.

Executed:

John G. Nipko 11/7/06
"ATC" by John Nipko Date

Carole Nipko 11/7/06
"ATC" by Carole Nipko Date

John G. Nipko 11/7/06
John Nipko, an individual Date

Carole Nipko 11/7/06
Carole Nipko, an individual Date

Roger J. Hoffman 11-7-06
"Modular" by Roger J. Hoffman, its Manager Date

Receivable Job Status Report

Contract Amounts		Change Order Information		Billings and Retainages			Receipts		Check #
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received
216 Ogden Valley Timberlodge		41 Ogden Valley Timberlodge							
506 989 00	506 989 00								
		11/04/05	162	220 994.00			0.00		
		11/23/05		46 513.68			0.00		
		11/29/05		22 837.82			0.00		
		12/05/05	163	30 635.88			0.00		
		12/13/05	164	16 119.98			0.00		
		12/19/05	165	26 229.50			0.00		
		12/28/05	166	17 104.00			0.00		
		1/04/06	174	21 033.00			0.00		
			Rcpt					220 994.00	11/04/05
			Rcpt					46 513.68	11/23/05
			Rcpt					22 837.82	11/29/05
			Rcpt					30 635.88	12/05/05
			Rcpt					16 119.98	12/13/05
			Rcpt					26 229.50	12/19/05
			Rcpt					17 104.00	12/28/05
			Rcpt					21 033.00	1/04/06
Totals		Change Orders		Billed		Retained		Received	
		0.00		401 467.86				401 467.86	
Current Contract Amount		506 989.00							
Remaining to be Billed:		105 521.14							
Remaining to be Paid:		105 521.14							

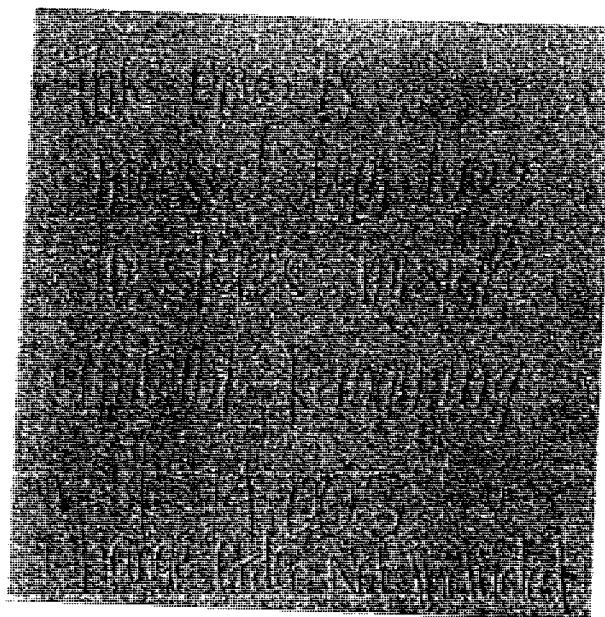
WORK IN PROGRESS
DRAWS YET TO COME

TC Marketing, LLC

10/27/06

12 43PM

Contract Amounts		Change Order Information			Billings and Retainages			Receipts		
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received	Check #
1 - Timber Creek Duplex 1		30 Timber Creek Duplex LLC								
453,342.00	453,342.00									
					6/01/06	165	75,359.00	0.00		
						Rcpt			75,359.00	6/01/06
	Totals			Change Orders			Billed	Retained	Received	
				0.00			75,359.00		75,359.00	
				Current Contract Amount			453,342.00			
				Remaining to be Billed			377,983.00			
				Remaining to be Paid			377,983.00			



: *Standard Report

Closed Jobs are excluded

35 of 10/27/06

218 to 3227

s are excluded

001454

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information			Billings and Retainages			Receipts	
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received
219 - Dennett Brothers		44 - Doug Dennett							
433 007.00	433 007.00								
		12/30/05	170	29 604.00				0.00	
		1/23/06	173	121 568.00				0.00	
		4/20/06	182	151 172.00				0.00	
		9/01/06	202	75 000.00				0.00	
			Rcpt						29 604.00 12/30/05
			Rcpt						121 568.00 1/23/06
			Rcpt						151 172.00 4/20/06
			Rcpt						75 000.00 9/01/06
Totals		Change Orders			Billed			Retained	Received
		0.00			377 344.00				377 344.00
Current Contract Amount				433 007.00					
Remaining to be Billed				55 663.00					
Remaining to be Paid				55 663.00					

File: *Standard Report

as of 10/27/06

n 3218 to 3227

Jobs are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information			Billings and Retainages		Receipts			
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received	Check #
220 - Kossin		42 Bruno Kossin								
519 569 00	519 569 00									
		10/05/06	0001	0.00						
					12/20/05	169	56 480.00	0 00		
					2/15/06	175	116 710 00	0 00		
					7/11/06	200	165 000 00	0 00		
					10/12/06	208	45 000.00	0 00		
						Rcpt			56 480.00	12/20/05
						Rcpt			116 710.00	2/15/06
						Rcpt			165 000.00	6/28/06
						Rcpt			45 000 00	9/22/06
Totals		Change Orders					Billed	Retained	Received	
		0 00					383 190 00		383 190 00	
		Current Contract Amount			519 569.00					
		Remaining to be Billed			136 379.00					
		Remaining to be Paid			136 379.00					

*Standard Report
s of 10/27/06
18 to 3227
are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information		Billings and Retainages		Receipts				
Original	Curent	Date	Number	Amount	Date	Number	Amount	Retained	Received	Check #
1 - Warm Creek - Franklin Squires		52 Franklin Squires								
0.00	0.00									
Totals		Change Orders				Billed		Retained	Received	
				0.00					0.00	
		Current Contract Amount		0.00						
		Remaining to be Billed:		0.00						
		Remaining to be Paid:		0.00						

*Standard Report
as of 10/27/06
18 to 3227
are excluded

Closed Jobs are excluded

10/27/06
12 43PM

Contract Amounts		Change Order Information			Billings and Retainages			Receipts	
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received
222 - Huth			43	Steve Huth					
315,987.00	315,987.00								
					12/30/05	171	32,185.00	0.00	
					3/09/06		73,144.00	0.00	
						Rcpt			32,185.00 12/30/05
						Rcpt			73,144.00 3/09/06
	Totals		Change Orders	Billed		Retained		Received	
			0.00	105,329.00				105,329.00	
			Current Contract Amount	315,987.00					
			Remaining to be Billed	210,656.00					
			Remaining to be Paid	210,656.00					

le: "Standard Report
s as of 10/27/06
3218 to 3227
obs are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information			Billings and Retainages			Receipts		
Original	Current	Date	Number	Amount	Date	Number	Amount	Retained	Received	Check #
273 - White Pine Ranch		47 - White Pine Ranch								
654 208 00	854 208 00									
					1/18/06		70 939 00	0 00		
					8/10/06	205	50 000 00	0 00		
					9/21/06	207	200 000 00	0 00		
						Rcpt			70 939 00	1/18/06
						Rcpt			50 000 00	9/12/06
						Rcpt			200 000 00	9/22/06
Totals		Change Orders					Billed	Retained	Received	
				0 00			320 939 00		320 939 00	
		Current Contract Amount				854 208 00				
		Remaining to be Billed				533 269 00				
		Remaining to be Paid				533 269 00				

File: *Standard Report
is as of 10/27/06
13218 to 3227
Jobs are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information			Billings and Retainages		Retained	Received	Receipts	Check #
Original	Current	Date	Number	Amount	Date	Number	Amount			
83,348.00	83,348.00									
49 Clinton Nichols										
		2/27/06	178	9,000.00			0.00			
		4/04/06	183	32,674.00			0.00			
			Rcpt					9,000.00	2/27/06	
			Rcpt					32,674.00	4/04/06	
Totals			Change Orders			Billed	Retained	Received		
				0.00		41,674.00		41,674.00		
Current Contract Amount						83,348.00				
Remaining to be Billed						41,674.00				
Remaining to be Paid						41,674.00				

*Standard Report
is of 10/27/06
218 to 3227
s are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information		Billings and Retainages		Receipts	
Original	Current	Date	Number	Amount	Date	Number	Check #
225 - Grover Shell		50 Clayton Grover					
331 532.00	331 532.00						
		2/28/06	177	30 000.00			
		4/10/06	181	131 766.00			
			Rcpt			30 000.00	3/27/06
			Rcpt			131 766.00	4/10/06
Totals		Change Orders		Billed	Retained	Received	
		0.00		161 766.00		161 766.00	
Current Contract Amount			331 532.00				
Remaining to be Billed			169 766.00				
Remaining to be Paid			169 766.00				

Title: "Standard Report
as of 10/27/06
from 3218 to 3227
Jobs are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information		Billings and Retainages		Receipts	
Original	Current	Date	Number	Amount	Date	Number	Amount
76 - Cea Shell		51 Al & Laura Cea					
344 233.00	344 233.00						
		3/23/06		34 000.00		0.00	
		6/07/06	187	138 116.00		0.00	
			Rcpt				34 000.00 3/23/06
			Rcpt				138 116.00 6/07/06
Totals		Change Orders		Billed	Retained	Received	
		0.00		172 116.00		172 116.00	
Current Contract Amount				344 233.00			
Remaining to be Billed				172 117.00			
Remaining to be Paid				172 117.00			

: *Standard Report
35 of 10/27/06
218 to 3227
s are excluded

Closed Jobs are excluded

ATC Marketing, LLC

Receivable Job Status Report

10/27/06
12:43PM

Contract Amounts		Change Order Information		Billings and Retainages		Receipts	
Original	Current	Date	Number	Amount	Date	Number	Amount
27 - Williford/Richardson		54 Wallace Williford					
240 458 00	240 458 00						
		4/04/06	180	18 000 00			0 00
		8/01/06	206	130 513 50			0 00
			Rcpt				18 000 00
			Rcpt				130 513 50
						4/04/06	
						9/12/06	
Totals		Change Orders		Billed		Retained	Received
		0 00		148 513 50			148 513 50
Current Contract Amount		240 458 00					
Remaining to be Billed		91 944 50					
Remaining to be Paid		91 944 50					

Left Owing + Extras

Williford. ————— 91,944.50
 Cea ————— 172,117.00
 Grover ————— 169,766.00
 Nichols. ————— 41,674.00
 White Pine ————— 533,269.00
 Huth. ————— 210,658.00
 Kossin ————— 136,379.00
 Dennett ————— 55,663.00
 Blue River ————— 74,005.00
 OUT ————— 105,521.00
 1,590,996.64

File: *Standard Report
 JS as of 10/27/06
 n 3218 to 3227
 Jobs are excluded

Closed Jobs are excluded